

May, 31, 2019

H. McMillan for the defendants
& S. Lomko for the plaintiff
Re endorsement of today's date.

On leave in the endorsement, their
motion is adjourned to July 8, 2019,
before me. *Andrew T. Graham*

MASTER ANDREW T. GRAHAM

July 8, 2019.

Conceded as above

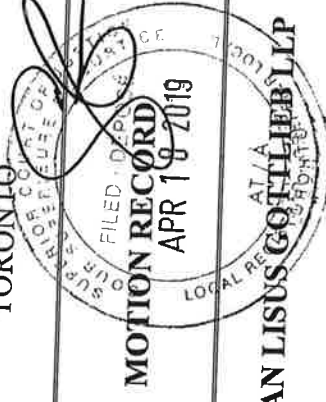
RD as see attached endorsement.
For reasons in that endorsement, the
~~RD's~~ action is hereby dismissed
with costs (not including costs previously awarded) typed at
\$15,000.00 including H. S. T.). *Andrew T. Graham*

MASTER ANDREW T. GRAHAM

Court File No. CV-18-00597958-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO



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Ontario Superior Court of Justice
(Toronto Region)

Twelve Gates Capital Group v. Mizrahi Development

COURT FILE NUMBER(S): CV-18-597958

July 8, 2019

Endorsement

CS Subsequent to my endorsement of May 31, 2019, the plaintiff has failed to ~~pay~~ ^{post} the security for costs and pay the costs awarded by Wislittman J. or to pay the costs of the dismissed appeal. The respondent once again seeks a dismissal of the action.

The plaintiff has filed a further affidavit of Lawrence Cogon in which he deposes that the plaintiff does not have funds to pay the security ordered, and provides bank statements showing a balance since September 28, 2018 of less than \$200⁰⁰. Mr. Cogon further deposes that the plaintiff ~~has~~ CS is trying to secure financing for several residential real estate projects. The plaintiff has had extremely limited cash flow since Wislittman J.'s order of December 20, 2018. The plaintiff will pay the security and costs "should

CS

the plaintiff successfully complete the aforementioned financing (or any other financing)".

As stated in ~~May~~ May 31, 2019 endorsement, time lines imposed by judicial orders should be complied with, as failure to enforce rules and orders undermines public confidence in the capacity of the justice system to process disputes fairly and efficiently (See 1196158 Ontario Inc. v. 0274013 Canada Ltd., 2012 ONCA 544 at PP 19). However, some latitude must be permitted for unexpected and unusual contingencies.

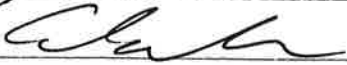
The court's role on a motion of this nature is to balance the plaintiff's interest in having its action decided on the merits with the defendant's interest in recovering ~~the~~ the costs awarded to it and having the security for its costs posted, and with the interests of the administration of justice in ensuring that its orders are ^{respected} requested. (See Garrett v. Oldfield, 2016 ONCA 424 at PP 6). In this case, the relevant factors are:

1. Nishitrawe J.'s order of December 20, 2018 required compliance within 30 days, i.e. as of January 21, 2019.
2. The plaintiff is now in breach of that order for 5.5 months.
3. The plaintiff is now in breach of a second order, being my order May 31, 2019 granting it the indulgence of an extension to June 28, 2019.
4. For the May 31, 2019 hearing, Mr. Cogon stated in his affidavit that he believed that the plaintiff would have the capital required to pay the security for costs by June 30, 2019, but the plaintiff has failed to do so.

5. The plaintiff now provides what is at best a non-committal assurance that it will pay the amounts owing "should [it] complete - or successfully complete the... financing".

In the face of the plaintiff's non-compliance with two court orders, a 9.5 month period of non-compliance with the first order, and no firm prospect of compliance in the relatively near future, there is no basis on which to grant the plaintiff a further indulgence. Pursuant to rules 56.06, and 57.03(2), ~~and 68.12~~ - 68 the plaintiff's action is hereby dismissed.

Costs: Under Boucher v Public Accountants Council (2004), 71 O.R.(3d) 291, the overall objective in fixing costs is to fix an amount that is fair and reasonable in the circumstances rather than an amount fixed by the actual costs incurred by the successful litigant. As of May 31, 2019, the defendant was seeking \$12,000 in fees (approx.) and the plaintiff was seeking \$9,000. The further materials prepared by the defendant, and by the plaintiff for the plaintiff's defendant review, were minimal. In addition, the parties were in court for another half day. A fair and reasonable figure for the entire motion is \$15,000, including HST and the plaintiff shall pay the costs fixed in that amount, within 30 days.


MASTER ANDREW T. GRAHAM